Editorial

The Emergence of Assisted Dying Legislation in Europe in Light of Supra-national Governance Failures

Prior to 2021, assisted dying was lawful in only four European jurisdictions – the Netherlands, Belgium, Luxemburg and Switzerland. Over the course of the next few years, this list is likely to increase significantly. In March 2021, the Spanish Parliament passed a Bill permitting adults with ‘serious and incurable’ diseases that cause ‘unbearable suffering’ to avail of either active euthanasia or assisted suicide. In November 2021, the first medically assisted suicide in Italy was authorised by the ethics committee of the regional public health authority of Marche. This follows a decision by the Italian Constitutional Court in 2019 that assisted suicide ought to be permissible in limited circumstances. In addition to this, a leading Italian right-to-die association (Associazione Luca Coscioni) secured over one million signatures to force a referendum on decriminalising euthanasia – which is expected to take place in 2022 subject to judicial approval. Beyond these developments in Spain and Italy, the Portuguese Parliament passed two Bills in 2021 permitting active euthanasia

1 Both active euthanasia and assisted suicide are lawful in the Netherlands, Belgium and Luxemburg, while only assisted suicide is lawful in Switzerland.
2 Ley Orgánica 3/2021, de 24 de marzo, de regulación de la eutanasia [Organic Law 3/2021, of March 24, regulating euthanasia].
3 M. Paterlini, “Paraplegic man is first person to be allowed to die by assisted suicide in Italy”, BMJ 375 (2927) (2021).
5 For full details on this campaign, please see (in Italian): https://referendum.eutanasialegale.it/chiude-il-referendum-eutanasia-oltre-12-milioni-di-firme/.
and assisted suicide for terminally ill patients – the first Bill was blocked by Portugal’s Constitutional Court for being too ‘imprecise’\(^6\) while the second Bill (which amended the first Bill in light of the Constitutional Court’s decision) was vetoed by the Portuguese President Marcelo Rebelo de Sousa due to his concern that it was still ‘too vague.’\(^7\) Most recently, in December 2021 the Austrian Parliament approved a Government supported Bill permitting terminally and/or chronically ill patients to obtain a lethal drug for the purpose of ending their own life.\(^8\) Meanwhile, a Bill seeking to permit assisted suicide for terminally ill patients subject to approval from a high court judge is currently before the House of Lords in the UK Parliament.\(^9\) While in Germany, a decision by the Second Senate of the Federal Constitutional Court in 2020 declaring the ban on assisted suicide ‘services’ to be unconstitutional\(^10\) has paved the way for two competing Bills – one presented by members of the Social Democrats and another by the Green Party – seeking to legalise assisted suicide, subject to different procedural safeguards.

Essentially, we are witnessing an unprecedented wave of new legal frameworks on assisted dying in Europe. For many right-to-die campaigners this may be seen as progress, however the reality may be quite different. It is evident from the political and public debates surrounding these developments that legalisation largely centres on first principle conflicts and variations of slippery slope claims. Questions of moral theory (can killing on request ever be benevolent and ultimately justifiable in law) or political morality (can the state legitimately control how competent adults choose to die) may indeed be answered coherently in favour of legalisation, but the above-mentioned developments (arguably with the exception of the new Spanish law) reveal a failure to grasp the complex content any subsequent legislation on assisted dying demands. Important details are often overlooked by those proposing reform in

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\(^9\) Assisted Dying Bill [HL], published 8 October 2021. Introduced by Baroness Meacher. This Bill is now at the Committee Stage (date yet to scheduled), providing the first chance for line by line examination of the Bill.

this area: ambiguities over ‘terminal illness’ as an eligibility requirement, problems with advanced directives and neurodegenerative disorders, the duration of waiting/‘cooling-off’ periods from the first request to the actual assistance, the permitting of assisted suicide but not active euthanasia, and the criminal/non-criminal governance dimensions of ex post de facto review procedures. These are not trivial details, they determine the content of the law – they determine the scope of the ‘right to assisted dying’ often vaguely proclaimed.

It is not argued here that we must seek to harmonise assisted dying laws across Europe - such a move, however desirable in principle, is simply not feasible in practice. However, the alternative patchwork of radically different assisted dying laws across Europe is not a human rights friendly approach. Moreover, this outcome is not unrelated to the governance failures, both judicial and political governance failures, at the Council of Europe.

On the judicial failure point, attention must be paid to the assisted dying jurisprudence of the European Court of Human Rights (‘the Court’/‘ECtHR’). Although the Court’s power to give binding judgments is, strictly speaking, limited to the concrete circumstance of the case, the reality in practice is that the Court’s case law - not just its final interpretation of fundamental rights but its argumentative strategies and procedural methods - reaches beyond the case at hand. Part of the Court’s supervisory position requires it to provide guidance to national authorities in an authoritative manner. The ECtHR’s primary mode of governance – its body of case-law – depends on this type of functional legitimacy. Unfortunately, the Court’s case-law regarding individual assisted dying applications has arguably produced more confusion than clarity. This uncertainty has left commentators to interpret this important jurisprudence in different ways.

11 Pretty v the UK, (App no. 2346/02) ECHR, 29 April 2002; Haas v Switzerland (App no. 31322/07) 23 January 2011; Koch v Germany (App no 497/09) ECHR 19 July 2012; Gross v Switzerland (App no 67810/10) 30 September 2014 ECHR (Grand Chamber); Nicklinson and Lamb v the UK (App no. 2478/15 and 1787/15) 23 June 2015.


14 Compare for example the English High Court’s interpretation of the ECtHR’s case-law in R (Purdy) v DPP with the House of Lords interpretation upon hearing the appeal of said decision. Also, see the German government’s declared uncertainty of the Court’s decisions.
ways. The ECtHR could have followed the classic constitutional rights doctrine visible in Germany, the Netherlands, and the U.S. – i.e. it could have consistently applied a clear bifurcated approach\(^\text{15}\) treating positive and negative obligations symmetrically. This would have allowed the Court to explicitly and clearly state what it appeared to be suggesting – that there is a wide *prima facie* (both negative and positive) right to opt for assisted dying, which is capable of restriction in light of public interest considerations – i.e. in light of a legality, legitimacy and fair balance test.

Taking into account public interest considerations at the stage of defining the very scope of a right to assisted dying\(^\text{16}\) is unjustly detrimental to the individual applicant.\(^\text{17}\) Failing to clearly divide the burden of persuasion means the applicant must refute the public interests to merely render his or her human rights under the Convention applicable.\(^\text{18}\) Given the strength and sensitivity of the public interests to limit acts of assisted dying, the burden on the individual applicants is acutely high. This has resulted in some Member States interpreting – with explicit reference to the Court’s case-law - the *prima facie* scope of a ‘right to assisted dying’ in an unduly limited way. See for example the Italian Constitutional Court decision which was largely hailed as a progressive decision by those seeking reform but in reality limited the right to those ‘kept alive by life-sustaining treatments’ only, or the current Bill before the House of Lords in the UK which provides for a right to assisted suicide (for terminally ill patients only) but not active euthanasia.

On the political failure point, one statutory body in particular, and its sub-committees, has played the dominant role in the Council of Europe regarding


\(^{\text{16}}\) For a clear, but by no means isolated example of this see the Court’s decision in *Haas*, supra note 11.

\(^{\text{17}}\) Instead, the applicant ought to bear the burden of persuasion in the first stage of review to show the applicability of a fundamental right, and the state bears the burden in the second stage of review to show that certain public interest considerations justify an interference with this right.

recommendations on assisted dying legislation19 – the Parliamentary Assembly of the Council of Europe (‘the Assembly’). The Committee of Ministers did support the Assembly’s Recommendation (1418) in 2003 but has remained quiet on the issue of assisted dying since. The Assembly on the other hand has not remained quiet, and its most recent stance is quite possibly its most uncompromising stance on the issue.20 Aside from concerns regarding the substantive quality of the arguments supporting the Assembly’s sub-committee reports, the discourse in the Assembly debates and the final recommendations/resolutions adopted, the primary concern (in light of the Assembly’s main governance function – as a deliberative forum/Europe’s ‘democratic conscience’)21 is the procedural process leading up to the adoption of the final recommendations. A number of media and public sources focused on the most recent text22 adopted by the Assembly, paying no attention to the questionable democratic process behind it. For example, The European Centre for Law and Justice hailed a “Major Victory for Life in Europe”, the London Daily Telegraph stated “Euthanasia and assisted suicide should be banned in every country in the Continent, the Council of Europe has ruled.” The net result is true, that is what the Parliamentary Assembly voted in favour of. But the final text must be stated with the proviso about how this decision on assisted dying was reached: by the insertion of a last minute oral sub-amendment unrelated to the detailed


20 Resolution 1859 (2012) – which is actually about Advance Decisions and proxy decision making, not legalised assisted dying – nonetheless states in Clause 5: ‘Euthanasia, in the sense of the intentional killing by act or omission of a dependent human being for his or her alleged benefit, must always be prohibited.’ Emphasis added here.

21 The primary mode of governance exercised by the Parliamentary Assembly is via its function as a forum for discussion. Although it shook off the formal title of ‘Consultative Assembly’, it is an institution that remains essentially advisory in character.

22 Supra note 20.
report behind the Resolution at hand, and passed with only 38 votes to 16 – i.e. passed by only 6% of the total number of Assembly parliamentarians.\textsuperscript{23}

In light of these governance failures, national governments in Europe are left with no useful guidance from the Council of Europe on both the first principle and more detailed aspects of how to regulate assisted dying. It is therefore not surprising to see the emergence of such drastically different assisted dying laws across Europe, and moreover the emergence of poorly drafted assisted dying laws which may exclude a significant number of people suffering unbearably and untreatably against their wishes.

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\textsuperscript{23} Note that only 9\% of the Assembly members were actually present to vote on the Recommendation.